



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2701/2015\*, \*\*

<i>Communication submitted by:</i>	X, Y, A, B, C and D (represented by counsels, Andrea Saccucci and Massimiliano Massara)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Greece
<i>Date of communication:</i>	25 September 2015 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 8 December 2015 (not issued in document form)
<i>Date of adoption of decision:</i>	26 July 2019
<i>Subject matter:</i>	Involuntary participation in exchange for government bonds
<i>Procedural issue:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Discrimination; effective remedy
<i>Articles of the Covenant:</i>	2 (3), read in conjunction with article 14, 4 and 26
<i>Article of the Optional Protocol:</i>	5 (2) (b)

1. The authors of the communication, submitted on 25 September 2015, are five nationals of Italy born in 1942, 1944, 1947, 1958 and 1966, and a national of Germany born in 1937. They claim that by forcing them to exchange their Greek government bonds for less valuable securities in the context of national debt restructuring, the State party violated their rights under articles 2 (3), read in conjunction with article 14, 4 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 5 August 1997. The authors are represented by counsel.

\* Adopted by the Committee at its 126th session (1–26 July 2019).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi. In accordance with rule 108 of the Committee's rules of procedure, Photini Pazartzis did not participate in the examination of the present communication.



**The facts as submitted by the authors**

2.1 As private creditors, the authors held Greek government bonds governed by Greek law prior to 9 March 2012, when the conditions governing the bonds were amended. As bondholders, they would ordinarily have been entitled to receive, at maturity, the face value of their bonds. However, in April 2010, the State party's debt was downgraded to junk bond status, indicating a higher risk of default or other adverse credit events. On 2 May 2010, the European Union and the International Monetary Fund (IMF) agreed to provide a €110 billion bail-out loan to the State party, on condition that it implemented harsh austerity measures.

2.2 In October 2011, Eurozone leaders agreed to offer the State party a second bail-out loan of €109 billion (later raised to €130 billion). This second loan was conditioned not only on the implementation of another harsh set of austerity measures, but also on the acceptance by private creditors of an overall restructuring of the State party's sovereign debt, through the so-called "private sector involvement" operation. The goal of the operation was to reduce the State party's debt burden from a forecast 198 per cent of gross domestic product in 2012 to 120.5 per cent by 2020.

2.3 Only international institutional investors holding a majority of the government debt were able to participate in the negotiations surrounding the terms of the private sector involvement operation. The authors, as minority government bondholders, were not invited to participate in the negotiations. During the negotiations, the majority bondholders accepted an offer to exchange the bonds for new bonds whose nominal value was 53.5 per cent less (reflecting a so-called "haircut"). The new bonds were issued with a maturity ranging from 11 to 30 years and with lower average yields. The bond exchange would allow the Government to write off several billion dollars of its debt.

2.4 On 23 February 2012, the Greek parliament approved the 2012 Greek Bondholder Act, introducing a legal framework for amending the "eligible titles" (the bonds in question) according to special procedures prescribed in the Act. The Act provided for the introduction and activation of collective action clauses, stipulating that the amendments the State party proposed to eligible titles would be considered approved by the bondholders if: (a) holders of at least 50 per cent of all the aggregate outstanding principal amount of all eligible titles accepted the modification process; and (b) at least two thirds of the participating principal amount consented to the amendments. If the offer was accepted, all eligible titles would be automatically cancelled by the registration of the new titles and any right or obligation derived from the former titles would be extinguished. The Act stipulated that the provisions therein, aimed at protecting the supreme public interest, were mandatory rules, immediately effective and prevailing over any contrary legislation, regulation or agreement.

2.5 On 24 February 2012, in accordance with the Bondholder Act, the authors were invited to either tender their government bonds for exchange or accept proposed amendments to their bond titles. The authors did not accept either of these invitations. However, under the terms of the Bondholder Act, if the requisite majority of private bondholders accepted such an invitation, the remaining minority bondholders who had not accepted it would also be involuntarily affected. On 9 March 2012, the Government announced that 85.8 per cent of private holders of bonds governed by Greek law had tendered their bonds for exchange or consented to proposed amendments. Having achieved the required majority, the Government then activated the collective action clauses that resulted in the cancellation of the authors' Greek government bonds from the market. Consequently, the authors' rights pertaining to those bonds were extinguished, while they received new bonds through an involuntary swap. Compared with their original bonds, the new bonds have a longer maturity period, and a greatly reduced face value. At the time the communication was submitted, the bond swap may have represented an economic loss of almost 70 per cent of the value of the authors' original investment.

2.6 The authors have no effective remedy in Greece. Invoking the Committee's Views on *Länsman et al. v. Finland*,<sup>1</sup> the authors maintain that they are not required to exhaust domestic remedies when the jurisprudence of the highest domestic tribunal has decided the

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<sup>1</sup> See CCPR/C/52/D/511/1992.

matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts. In that regard, the authors assert that on 21 March 2014, the Council of State (the supreme administrative court of Greece) rejected a similar set of petitions filed by bondholders of Greek nationality. The Court found that the provisions of the Bondholder Act and the decision of the Government to apply the collective action clauses did not contravene the constitutional principle of equality or the rights to property and non-discrimination under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

2.7 Moreover, according to the Committee's jurisprudence, the authors are not required to challenge an action that is clearly authorized by domestic legislation.<sup>2</sup> In the present case, the collective action procedure was introduced retroactively under the 2012 Bondholder Act and was applicable to all government bonds governed by Greek law, allowing the State party to impose the proposed amendments to eligible titles if approved by two thirds of the bondholders, therefore also imposed on the minority of bondholders who did not consent to them. Furthermore, the Greek parliament stated that the application of the collective action procedure was necessary in order to safeguard the supreme public interest and declared that the provisions in question prevailed over any contrary legislation. The retroactive introduction of the collective action procedure was intended as a derogatory measure impeding the rights of the bondholders. In addition, the authors have no effective remedy in Italy, owing to the principle of foreign government immunity.

2.8 The authors submitted the same matter to the European Court of Human Rights, which declared their application inadmissible through a single-judge decision that did not state specific grounds of inadmissibility.

### **The complaint**

3.1 The authors allege that by forcing them to exchange their Greek government bonds for less valuable bonds through the activation of collective action clause procedures set forth in the 2012 Bondholder Act, the State party violated their rights under articles 2 (3), read in conjunction with article 14, 4 and 26 of the Covenant.

3.2 In violation of their rights under article 2 (3), read in conjunction with article 14 of the Covenant, the authors have no remedy within the Greek legal system for the infringement of their rights under article 26, for the reasons stated in paragraphs 2.6 and 2.7 above.

3.3 The State party also breached the authors' rights under article 4 of the Covenant by adopting the extraordinary measures permitting the bond exchange, thereby derogating from its obligations under the Covenant without complying with the requirements laid down therein. A situation of serious economic crisis or financial instability has never been considered to justify derogation from obligations contained in human rights treaties. It is unclear whether the adoption of the bond swap measures was "strictly required by the exigencies of the situation", within the meaning of article 4 of the Covenant. In addition, the State party failed to fully inform the Secretary-General of the United Nations of the contested derogatory measures and the grounds on which they were based.

3.4 In violation of article 26, the State party treated the authors unfavourably compared with other bondholders, without a reasonable justification or a legitimate aim. Because the authors were forced into a debt restructuring deal based on extremely unfavourable conditions, they suffered a form of discrimination based on property in several respects. First, the authors were disadvantaged compared to "official investors", including the European Central Bank and the central banks of foreign Governments, whose holdings in the bonds were not subject to any sort of debt restructuring. In addition, as private holders of Greek government bonds regulated by Greek law, the authors were disadvantaged compared with private holders of Greek government bonds regulated by foreign law.

<sup>2</sup> The authors refer to *A. v. Australia* (CCPR/C/59/D/560/1993), *Sohn v. Republic of Korea* (CCPR/C/54/D/518/1992), *Johannes Vos v. Netherlands* (CCPR/C/66/D/786/1997) and *Faurisson v. France* (CCPR/C/58/D/550/1993).

Indeed, unlike the latter, the authors were subject to the State party's Bondholder Act, and to the State party's collective action clause procedure.

3.5 Moreover, the authors were disadvantaged compared to other holders of Greek government bonds, who did not participate in the private sector involvement bond exchange and were therefore able to cash out in full their entitlements after the exchange without suffering any loss on the nominal value of their investment. For example, a hedge fund holding a significant portion of the 5 per cent portion of the State party's debt that was not subject to restructuring was reportedly paid over €400 million by the State party in May 2012. Furthermore, other bondholders participating in the exchange benefited from more favourable conditions. For example, bondholders in the United States of America received a 15 per cent repayment in cash instead of payment notes with a maturity period of one to two years.

3.6 Finally, when enforcing the swap, the State party's authorities treated in the same way investors whose situations were profoundly different. The authors received the same treatment as institutional private investors (banks, funds, insurance companies, etc.), even though, *inter alia*, the institutions could easily keep the new bonds offered in exchange by the State party until they matured, without being forced to sell them at a reduced price. Institutional private investors were put in a position to gain a significant advantage from the restructuring deal, given that, while they participated in negotiations for the private sector involvement bond exchange, they continued to buy Greek government bonds from retail holders at a very low price (around 20 per cent of the face value of the bonds). Thus, the differential treatment of the authors *vis-à-vis* other similarly situated bondholders, combined with the failure to provide to the authors differential treatment *vis-à-vis* bondholders whose situation was substantially different, constitutes discrimination within the meaning of article 26 of the Covenant.

3.7 The State party failed to provide the authors with adequate information before activating the collective action clauses. The activation breached the authors' confidence, was not foreseeable and deprived them of any possibility to opt out or sell their bonds. The authors must therefore hold the bonds until they mature, although they may not live long enough to enjoy the return on their investment.

#### **State party's observations on admissibility**

4.1 In its observations on admissibility dated 8 February 2016, the State party provides background information on the global financial crisis in 2008, Greek government bonds, the economic factors that led Greece to engage in the bond exchange, collective action clauses and the Bondholder Act. Despite financial assistance provided by the European Union and the International Monetary Fund in May 2010, the financial situation in the State party continued to deteriorate over the course of that year. In June 2011, the finance ministers of the eurozone States agreed that further measures, including additional funding from official and private sources and private sector involvement, were necessary to avoid a default. On 26 October 2011, the eurozone Heads of State agreed on the terms for the private sector involvement required for the continued support to the State party by the eurozone States. The agreement called for a write-off of approximately 50 per cent of the aggregate principal amount of government bonds held by private creditors, to be implemented in early 2012. On 21 February 2012, the finance ministers of the eurozone States announced an increase in the financial package for Greece, in which they acknowledged the common understanding reached with the private sector on the general terms of the private sector involvement operation, providing for a nominal haircut of 53.5 per cent of the face value of the Greek debt. That financial support was conditioned upon the implementation of the debt exchange. The enactment of the subsequent Greek Bondholder Act (Law 4050/2012) and related legislation enabled the collective action process for restructuring the public debt, as well as its performance and implementation. The legislation provided for action that was lawful, necessary and appropriate to serve an overriding public interest in a fair and proportionate manner.

4.2 Collective action clauses are conditions set out in laws or contracts aiming to organize bondholders-creditors into a group whose decisions are based on collective rather than individual interests. Greek government bonds, the primary tool of State borrowing, are

long-term debt securities issued by the State party with a maturity exceeding one year. Under article 8 (2) of Law 2198 of 1994, a bondholder has no claim against the State party on a Greek government-issued bond, unless the State party fails to fulfil its obligation to pay the Bank of Greece its obligation when the bond matures. This exception does not apply in the present communication. The collective action clauses instituted under the Greek Bondholder Act represented part of a voluntary process of amendment and exchange of securities issued or guaranteed by the Government. The clauses were activated, in conformity with the law, upon the fulfilment of certain prescribed conditions relating to participation, quorum and a qualified majority of consenting bondholders. That was done in order to ensure a uniform and effective restructuring of Greek debt at sustainable levels and on the basis of the principle of equal treatment of creditors.

4.3 Information on the procedural details of the private sector involvement operation was published on an official website, on which the invitations to participate in the operation and all other relevant material, such as the legislative framework and announcements, were posted. In addition, credit institutions and other custodians undertook to notify their customers of the process according to the general principles governing the legal relationship between credit institutions and their customers. The high participation rate in the operation reveals that the trustees of the investors informed the latter of the operation, as provided for in the agreements entered into between them.

4.4 The communication is inadmissible under article 1 of the Optional Protocol because the authors lack victim status, as they have not shown that they were personally and directly affected by the involuntary bond exchange in March 2012. Specifically, they have not established that they in fact held the bonds that were subject to the bond exchange process. Given the legal nature of bonds and their functioning as bearer, book-entry, secondarily tradeable and transferable securities, the State party does not and cannot know who holds the securities it issues and which transactions are made thereon by each holder. The State party is therefore unable to determine the ultimate holder of each security; such information is available to the credit institution that sells the securities, which is the depositary of every investor. In order to establish that they held the affected securities at the relevant time, the authors must submit certificates containing the exact features of their securities, namely the international securities identification number, date of issuance, interest rate and quantity, as well as evidence of possession of such securities, such as date of purchase and purchase price, and the content of any orders concerning their participation or non-participation in the voting process. Because not all of the documents provided by the authors were translated into one of the official United Nations languages, the State party is unable to ascertain whether the authors have acquired rights on the securities subjected to the involuntary swap.

4.5 The communication is also inadmissible under article 5 (2) (b) of the Optional Protocol, because the authors did not exhaust domestic remedies. Specifically, they could have, but did not, lodge a petition for annulment of the disputed administrative acts before the Council of State. Individuals who did not lodge such a petition (or missed the time limit for doing so) accepted the lawfulness of the bond exchange procedure. The Council of State may assert a lack of competence, infringement of an essential procedural requirement, violation of the law or abuse of discretionary power. An application before the Council of State is admissible if it is instituted within 60 days of the notification of the act to the applicant, or of its publication if the law provides for that, or in the absence thereof, of the day on which the act came to the applicant's knowledge. That deadline is extended to 90 days when the applicant is residing abroad. In the present case, the deadline started running on 9 March 2012 with the publication in the Official Gazette of ministerial decision No. 2/20964/0023A of 9 March 2012 of the Deputy Minister of Finance. The debt reduction through the exchange of bonds was widely reported in both the domestic and international media and all parties concerned would therefore have had the opportunity to be immediately informed of the process. In an application for annulment before the Council of State, an applicant can allege infringement of his or her rights as protected by the Constitution, the European Convention on Human Rights or the Covenant. Thus, there is no doubt that a petition for annulment constitutes an effective remedy. Indeed, certain foreign residents lodged petitions for annulment of the disputed decisions before the Council of State within the prescribed deadline.

4.6 By failing to lodge such a petition containing their claims under the Covenant, the authors deprived the Council of State of the opportunity to examine the alleged violations. When the deadline for filing a petition for annulment expired, the Council of State had not yet ruled on the matter in dispute by any prior judgment. Its first judgment on the matter was issued well after the deadline. The authors thus had access to an effective remedy during the time period for filing a petition for annulment and by not using it accepted the lawfulness of the disputed administrative bond exchange procedure.

#### **Authors' comments on the State party's observations on admissibility**

5.1 In comments dated 15 April 2016, the authors contest the State party's assertion that the Greek debt restructuring operation in the spring of 2012 was a voluntary process. In reality, a minority of bondholders was obligated to adhere to the decision made by the majority. Moreover, the collective application clauses did not come into effect before 23 February 2012 and were applied retroactively in violation of a previous agreement. The authors never consented to the activation of these clauses, which radically changed the terms under which they agreed to invest in the bonds.

5.2 The authors have established their status as victims because they were in fact personally and directly affected by the involuntary bond exchange. The documents for one of the authors were translated into English and should have been reviewed by the State party. Although not all documents were translated into English, a bank account statement could be understood with due diligence from the State party. In any case, the authors have requested additional documents from their credit institutions. They provide documents translated into English that give details about the securities in question (date of issuance, quantity, date and price of purchase, etc.) to indicate that the authors held the securities during the relevant time.

5.3 Regarding exhaustion of domestic remedies, the authors note that the Council of State has already rejected the petitions for annulment that were filed by many similarly situated individuals. This remedy is therefore not effective, as it does not offer a reasonable prospect of redress. Moreover, according to the Committee's jurisprudence, complainants are not required to exhaust a remedy "whenever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic court".<sup>3</sup> The State party does not dispute that the jurisprudence of the Council of State cannot be overturned, and that any similar petition is bound to fail. Furthermore, the Committee has considered that "when the alleged violation derives from the direct application of the law, it would be futile to expect an author to bring judicial proceedings which would merely confirm that the primary legislation ... does in fact apply".<sup>4</sup> It is well settled under the Committee's jurisprudence that authors are not required to challenge a State action that is clearly authorized by domestic legislation. In the present case, the activation of the collective action clauses was clearly authorized by the Bondholders Act.<sup>5</sup> Finally, the authors were unable to challenge the State party's violations before Greek courts, as they received no information about the swap and its consequences. Thus, they did not even have the 15 days provided to domestic investors to reply to the bond swap invitation.

#### **State party's observations on the merits**

6.1 In its observations on the merits dated 8 June 2016, the State party provides additional information on the private sector involvement operation, the three phases of the debt restructuring and the bond swap. In its judgment No. 1116/2014, the Council of State confirmed the legality of the bond exchange after its plenary session had examined petitions for annulment lodged by Greek government bondholders. The Council of State held that the bond exchange, which was provided for by law and dictated by reasons of public interest, did not raise any matters concerning infringement of the principle of equality and the

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<sup>3</sup> The authors cite, *inter alia*, *Länsman et al. v. Finland*, para. 6.2.

<sup>4</sup> The authors cite *Bernadette Faure v. Australia* (CCPR/C/85/D/1036/2001), para. 6.2.

<sup>5</sup> The authors cite, *inter alia*, *A. v. Australia*, para. 5.6.

property rights protected by the Greek Constitution and the European Convention on Human Rights. No issues regarding infringement of the Covenant were raised.

6.2 The communication lacks merit. The authors' claim under article 26 of the Covenant is unfounded. The Bondholder Act resulted from public interest concerns and was implemented in entirely exceptional circumstances, namely the prospect of the collapse of the national economy owing to default on payments. It was clear that the State party would be unable to meet not only its borrowing obligations but also its elementary operational needs (for salaries, pensions, health care, national defence, education, etc.). In the absence of immediate and drastic measures to reduce the State party's short and long-term borrowing obligations, the economy would certainly have failed. That would have had a domino effect on other States in the eurozone.

6.3 Owing to the nature and operation of bonds, which are dematerialized bearer-anonymous securities that are traded at any given time in the secondary market worldwide, the State party does not and cannot know the holders of the securities it issues, nor the transactions made thereon by each holder. The purpose of collective action clauses is to allow a distressed debtor to reach an agreement with its creditors concerning a debt restructuring plan that will permit sustainable operation and servicing of the restructured debt. There are frequently disputes between creditors as to how to restructure debt. When some creditors refuse to participate in debt restructuring plans, they essentially roll over to the other creditors the costs and burden of the consolidation of the debtor and, motivated by their own interests, reject the debtor's proposal to preserve their initial claims to the fullest extent. In the case of market-traded bonds with a high degree of dispersion among the public, insisting on unanimity among creditors in order to reach a restructuring agreement, or limiting the agreement only to those who accept it may lead to a cancellation of the restructuring plan.

6.4 The activation of the collective action clauses was not forcible but voluntary. More specifically, instead of directly rewriting the terms of the existing bonds, the State party adopted legislation authorizing it to obtain the bondholders' consent to amend the existing bonds. There was no unilateral imposition of new terms upon bondholders, nor a mandatory exchange of bonds. Rather, there was a collective procedure, according to which a specific quorum and increased majority would suffice in order to amend the terms of issuance of the bonds. The amendment and exchange were voluntary and did not involve retroactive application of any law, because their implementation depended solely on the decision of bondholders. Thus, given the voluntary nature of the process, there was no infringement of article 26 of the Covenant.

6.5 Moreover, from the time the exchange process was announced until its completion, no remedy was lodged anywhere in the world in order to attempt to suspend the private sector involvement operation. This demonstrates that the process was the necessary, unavoidable and sole solution to immediately restructuring the debt and preventing the complete loss of investors' funds.

6.6 Concerning the authors' claim that the non-personalized nature of the bond swap constituted discriminatory treatment, any differentiation among investors on the basis of a non-objective criterion would have violated the principle of equal treatment. It would also have undermined the attempted debt restructuring, because it was impossible to calculate in advance the results of the votes to be held for all securities, a subset of which were the eligible securities under the Bondholder Act. Regarding the authors' claims that they were disadvantaged compared with other investors, the Bondholder Act sets forth legal consequences that are linked only to eligible titles, irrespective of the holders of those titles (the "investors"). Thus, the legislation contains an objective and non-discriminatory criterion. All investors, irrespective of their identities, personal data or status, have the same claims to the securities. Anyone who had claims arising from the Bondholder Act was treated equally and was offered a possibility to participate in the bond exchange.

6.7 The State party provides additional details about the exchange procedure and contests the authors' assertion that institutional private investors negotiated the haircut and the other conditions of the private sector involvement. There was an informal discussion between the Government and the Private Creditor Investor Committee (composed of 32

members and a steering committee composed of 13 major creditors), but no binding commitment for any investor came out of it. The authors' decision to keep their securities was an investment choice. As members of the organized body of creditors, they had the opportunity to express their will in the official competent forum. Concerning the authors' allegations that investors, including central banks, benefited from more favourable conditions, the State party cites a 2015 decision by the General Court of the European Union, according to which central banks of the eurosystem, whose investment decisions are exclusively guided by the public interest, are differently situated vis-à-vis private investors who purchased Greek debt securities solely on the basis of their own private interest, regardless of the specific reason for their investment decisions.

6.8 The State party contests the authors' assertions regarding their economic loss, and observes that the average price of the new bonds has almost tripled. The authors would have sustained a total loss if the private sector involvement had not been successfully completed.

6.9 The authors' claim under article 2 (3), read in conjunction with article 14 of the Covenant, is without merit. Article 2 (3) does not impose on States parties an obligation to provide any particular form of remedy. The petition of annulment before the Council of State represented a suitable and effective remedy for the authors. However, the authors did not lodge such a petition, as previously stated. The State party describes in detail the procedures surrounding the petition of annulment and maintains that it constitutes an effective remedy.

6.10 The authors' claim under article 4 of the Covenant is similarly ill-founded. The State party did not derogate from any obligation under the Covenant, for the reasons described above. The bond exchange was a voluntary procedure based on objective and reasonable grounds and dictated by reasons of public interest.

6.11 In further observations dated 7 October 2016, the State party cites the judgment of the European Court of Human Rights, dated 21 July 2016, in a case concerning the exchange of Greek government bonds (*Mamatas and others v. Greece*, application Nos. 63066/14, 64297/14, and 66106/14). In this judgment, the Court held that by establishing the private sector involvement, the State party had not violated article 1 of Protocol No. 1 to the European Convention on Human Rights (concerning protection of property), or article 14 of the Convention (concerning non-discrimination), read in conjunction with article 1 of Protocol No. 1.

#### **Authors' comments on the State party's observations on the merits**

7.1 In comments dated 26 September 2016, the authors reiterate that they have victim status and have exhausted domestic remedies for purposes of admissibility. Compliance with the requirement to exhaust domestic remedies should be evaluated when the Committee considers the communication, not when the communication is submitted.<sup>6</sup> The Committee should take into account the fact that the Greek debt crisis affected 15,000 households in Greece, as well as foreign nationals, and it could not be reasonably required of each of them to challenge the contested bond exchange.

7.2 The authors reiterate that they never agreed to the collective action clauses. The securities that they purchased were bonds governed by Greek law that excluded the applicability of collective action clauses. The authors were never involved in negotiating the terms of the exchange deal to which these unilateral clauses applied.

7.3 Regarding article 26 of the Covenant, the State party discriminated against the authors vis-à-vis other types of investors at the beginning of the debt restructuring process, when it chose the mechanism for carrying out this process. States may choose from a variety of debt restructuring vehicles (e.g. debt cancellation, bilateral debt renegotiation, debt restructuring and exchange offer to private holders of securities). In the present case, the State party chose to restructure the bonded debt. That was the easiest way to impose an

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<sup>6</sup> The authors cite, inter alia, communication No. 925/2000, *Wan Kuok Koi v. Portugal*, decision of inadmissibility adopted on 22 October 2001, para. 6.4.



unfair exchange offer unilaterally. In addition, the State party impermissibly discriminated against the authors vis-à-vis privileged “quasi-sovereign bondholders” (such as the European Central Bank, national central banks of the eurozone and the European Investment Bank), who were shielded from the debt restructuring process. Just before the exchange offer, the securities held by quasi-sovereign bondholders were exchanged for newly issued bonds with the same value and identical date of maturity. Those bonds were then exempted from the private sector involvement operation. Thus, contrary to the State party’s assertion, it was indeed possible to exempt certain bondholders from the exchange offer. Indeed, on 15 May 2012, the State party paid €436 million for securities that had not been subject to renegotiation and had reached maturity. While the majority of the securities that escaped the bond exchange were held by a vulture fund based in the Cayman Islands, small private investors were forced to face the dire consequences of austerity measures.

7.4 Regarding article 2 (3), read in conjunction with article 14 of the Covenant, the authors dispute the State party’s observation that the petition of annulment before the Council of State represents an effective remedy to challenge the retroactive activation of the collective action clauses. Domestic law requires foreign applicants to lodge an application for petition of annulment within 90 days of the publication of the last act that completed the contested administrative operation. However, the authors did not receive timely notice of relevant events, which happened in a span of only two weeks. Specifically, they did not receive any notice about the invitation memorandum of 24 February 2012. It was only after the bond exchange had occurred that, by chance, the authors discovered that their eligible titles had already been modified without their consent. At that time, they acknowledged that they had lost 53 per cent of the nominal amount of their securities and it was too late to challenge the action in Greece. Moreover, a retroactive and forcible action of collective action clauses had never happened before and the authors could not have foreseen that it would occur. Thus, they cannot be blamed for a lack of due diligence in promptly resorting to domestic remedies, as they did not have a fair position to gain access to the domestic courts. It is not reasonable to consider that the ordinary domestic procedure was accessible and effective to challenge exceptional measures that were unilaterally imposed without adequate notice. The Committee has considered in its jurisprudence that when violations originate by direct application of the law, it is futile to expect an author to bring judicial proceedings that would merely confirm that the primary legislation does in fact apply.<sup>7</sup> In response to the State party’s observation regarding the authors’ failure to file complaints abroad in order to suspend the private sector involvement, the authors maintain that the principle of foreign State immunity would have prevented the State party from being judged by foreign courts.

7.5 Although the authors acknowledge that the application of article 4 of the Covenant is not at issue in the present communication, the State party should have requested derogation from its obligations under the Covenant, which it has violated.

7.6 In further comments dated 4 November 2016, the authors contest the relevance of the aforementioned judgment of the European Court of Human Rights (*Mamatras and others v. Greece*). The judgment is not dispositive because: (a) it is not final, as a request for referral to the Grand Chamber is currently being examined; (b) it refers to a claim of property rights that is totally absent in the present communication; and (c) discrimination is not a self-standing right under the European Convention on Human Rights but only relates to the rights and freedoms set forth in the same Convention and thus, the scope of this right is narrower than that under article 26 of the Covenant. In the judgment, the Court openly refused to examine the different instances of discrimination claimed by the authors and argued that the applicants’ rights had to be considered in the broader context of the Greek public debt restructuring process. This contextualization led the Court to guarantee to the maximum extent possible the margin of appreciation of the Greek authorities, to the detriment of the applicants. The Court considered that the State party’s measures were justified in order to ensure the success of the private sector involvement operation and pretended that no issue of discrimination had arisen. In fact, the State party did not even have to discriminate against individual investors who did not consent to the bond swap in

<sup>7</sup> The authors cite *Bernadette Faure v. Australia*, para. 6.2.

order to ensure the success of the private sector involvement. Even without the activation of the collective action clauses and the involuntary imposition of the bond swap, the private sector involvement would have reached its goal of restructuring the State party's debt. The Government publicly stated that it would have agreed not to unilaterally enforce the swap against non-consenting bondholders if 90 per cent of the aggregate face value of all the bonds selected to participate in the private sector involvement had been voluntarily exchanged. Framed in this context, it is clear that the decision to activate the collective action clauses was arbitrary.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee notes the State party's argument that the communication is inadmissible because the authors did not exhaust domestic remedies, as they failed to challenge the Bondholder Act and the activation of the collective action clauses before the Council of State. The Committee also notes the State party's argument that under that procedure, the Council of State may assess whether an applicant's rights under the Covenant, as well as other human rights treaties, have been violated. The Committee further notes the State party's argument that, under the same procedure, the Council of State may also assess whether the challenged administrative act is in violation of essential procedural requirements, is in violation of the law or constitutes an abuse of discretionary power.

8.4 The Committee notes the authors' argument that they did not have access to an effective remedy in the State party that would have had any reasonable prospect of success and would have led to a finding of a violation of their rights under the Covenant. The Committee also notes the authors' argument that on 21 March 2014, the Council of State had ruled on petitions brought by other bondholders before the Council and had found that the provisions of the Bondholder Act and the decision of the Government to activate the collective action clauses did not contravene the constitutional principle of equality and were not in breach of the right to property or the prohibition of discrimination under the European Convention on Human Rights. The Committee also notes the authors' argument that they received no timely information about the bond exchange. The Committee further notes the authors' argument that, as the activation of the collective action clauses was clearly authorized by the Bondholders Act, it would have been futile to challenge the activation of the clauses before the Council of State.

8.5 The Committee recalls its jurisprudence that although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.<sup>8</sup> The Committee also recalls its jurisprudence that when the highest domestic court has ruled on the matter in dispute in a manner eliminating any prospect that a remedy before domestic courts may succeed, authors are not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.<sup>9</sup> The Committee observes that in the present case, the authors could have filed an application for annulment before the Council of State claiming a violation of their rights under the Covenant. The Committee notes that the invitation and the terms for participation in the private sector involvement operation

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<sup>8</sup> See, inter alia, *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3, and *García Perea and García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2.

<sup>9</sup> See, inter alia, *S.A. et al. v. Greece* (CCPR/C/121/D/2868/2016), para. 6.4, and *Gomáriz Valera v. Spain* (CCPR/C/84/D/1095/2002), para. 6.4.

were made public in a press release issued by the Ministry of Finance on 24 February 2012, and that information on the operation was posted on a specific website, while credit institutions undertook to inform their customers about the operation. It also notes the State party's argument that the operation and the bond exchange were widely reported in the domestic and international media. The Committee further notes that, at the time the deadline for the filing of a petition for annulment expired, the Council of State had not ruled on the matter in dispute by any prior judgment. In fact, the first judgment on the matter delivered by the Council of State, as acknowledged by the authors, was issued well after the deadline, on 21 March 2014, that is to say two years after the deadline had expired. In these circumstances, the Committee is of the view that, by not filing an application for annulment before the Council of State when they were entitled to do so, the authors failed to exhaust available domestic remedies. The Committee therefore considers that the communication is inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.<sup>10</sup>

8.6 Having thus concluded, the Committee will not separately examine the admissibility grounds under article 1 of the Optional Protocol.

9. The Committee therefore decides:

- (a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and to the authors.

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<sup>10</sup> See *S.A. et al. v. Greece*, para. 6.4.